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No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of New Jersey

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APPELLANTS' REPLY MEMORANDUM

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This is simply not a case for summary affirmance. The record squarely presents the two, substantial, and as yet unresolved questions raised in Appellants' Jurisdictional Statement.

On January 19, 1982, the New Jersey Legislature enacted a reapportionment plan for the election of United States Representatives. Based on data from the 1980 Census, the plan's fourteen districts have an average population deviation of 0.135%, and a maximum deviation (between the smallest and largest districts) of 0.6984%. The District Court concluded that the Legislature could have enacted a plan which, using the 1980 Census figures, would appear to have had a smaller population deviation. The District Court therefore held the Legislature's plan

unconstitutional. However, Census data are not and cannot be made entirely accurate. As shown by the uncontradicted evidence on this record, the plan enacted by the Legislature has a maximum deviation that is *smaller* than the statistical imprecision of the Census figures used to calculate that deviation. As Dr. Trussell put the matter, "In my professional opinion, districts whose enumerated populations differ from one another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion." [1] The record thus squarely pre-

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[1] Exhibit DFLH-5 below, at 9. This exhibit is the statement of Dr. James Trussell of Princeton University, a member of the National Academy of Sciences panel convened to study plans for the 1980 Census. Dr. Trussell was responsible for evaluating the Census Bureau's methodology designed to estimate population undercount. DFLH-5, p. 2. Dr. Trussell's statement, unsworn, was made under the penalty of perjury as authorized by 28 U.S.C. § 1746, and under that statute has precisely the same force and effect as if the statement were made in the form of an affidavit. Understandably, Appellees made no objection to this quite proper procedure below. In fact, at the hearing below Appellees' counsel agreed to submit the case for decision without the presentation of live witnesses "as long as all the submissions, all the depositions, all of the affidavits are received in evidence." Transcript of Proceedings, February 26, 1982, at 56-57. That some of the evidence—including, specifically, Dr. Trussell's—had been submitted in the manner authorized by 28 U.S.C. § 1746 had been discussed previously and accepted by the District Court at the hearing. *Id.* at 40-42. To the extent that statements in their Motion to Affirm, at 11, may be objections to the form in which this evidence was presented, the objections are both untimely and unwarranted.

Appellees also claim that Dr. Trussell's statements are "mixed and contradictory," *id.* at 11-12, and therefore should be disregarded. They miss the point. Dr. Trussell's testimony was that "The undercount for New Jersey in the 1980 Census is unknown, and no reliable methodology exists for estimating it." Exhibit DFLH-5 below, p. 8. Appellees merely point to supporting testimony making some of the uncertainties explicit. Of course, if it were possible to know the inaccuracy of the Census precisely, appropriate correction could be made and it would no longer be inaccurate.

sents the question whether state legislatures must pursue the illusory goal of creating congressional districts with population deviations smaller than the statistical imprecision inherent in the figures used to calculate these population deviations.

Likewise, the record squarely presents the question whether the minuscule deviation from absolute census population equality embodied in the Legislature's plan is in any event justified by the Legislature's desire to avoid undue dilution of minority voting strength. Appellees seek to characterize this as a merely factual question resolved by the District Court. It is not. Nowhere in its opinion did the District Court reject the uncontradicted testimony of legislative leaders that one major goal of any reapportionment plan enacted must be to preserve minority voting strength. Nor did that court find that any of the other plans presented to the Legislature would have protected minority voting strength as well as the plan enacted.[2]

Instead, the District Court imposed an additional requirement. It held that every deviation from absolute census population equality must be shown to be directly,

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The whole point of Dr. Trussell's testimony is that we do not, and with presently available methods can not, know the exact size of the New Jersey undercount.

[2] In fact, the alternatives would not have protected minority voting strength as well as the Legislature's plan. For all but one of the alternatives this is so, even if, like Appellees, one considers only the Tenth District. See Jurisdictional Statement, at 12-13; Application for Stay, at 19-21. Although the Hardwick Plan (A-3817) left a few more black voters in the Tenth District than the Legislature did (56.70% compared to 54.75%), it seriously diluted black voting power elsewhere in the State. Under the Legislature's plan, the Fourth District (Trenton and surroundings) is more than 16% black. Under the Hardwick Plan it would have been less than 12% black, and several of the fastest-growing black townships would have been excluded from the district. DFLH Exhibit 4 below, at 6. Not surprisingly, the Legislature's plan was preferred by black leaders over any of the alternatives. See Application for Stay, at 21.

causally related to the preservation of minority voting strength. The District Court concluded that preservation of minority voting strength was the *only* legislative goal presented by this record that could justify any deviation from absolute census population equality. This Court, however, has never suggested that no other goals could ever justify such a deviation. *E.g.*, *White v. Weiser*, 412 U.S. 783, 790-791 (1973). And of course, to say that the Legislature may have had other goals in mind in addition to the goal of preventing dilution of minority voting power does not mean that preventing dilution of minority voting power is not a proper goal, and one highly relevant when considering the constitutionality of the Legislature's redistricting plan. See *Katzenbach v. Morgan*, 384 U.S. 641, 656-658 (1966).

Even accepting this questionable conclusion of law, the District Court's judgment on the question of preservation of minority voting strength contains a more fundamental flaw. That court's consideration of the question focused solely on the fact that the Legislature's plan failed to include Orange, "a city with a high concentration of minority groups," in the Tenth Congressional District. The Tenth District is 54.8% black under the plan adopted by the Legislature. Of course Orange, which as the District Court observed is 57.3% black, could have been placed in the Tenth District. What the court failed to note, however, is that to include Orange in the Tenth District would have required that an equal number of voters—many of them black—would have had to be removed from the Tenth District and placed somewhere else. This shift, in turn, might require voters from the new district to be moved into yet a third district, and so forth. The fundamental flaw in the District Court's analysis is that it focused on the Tenth District alone, not recognizing that under the general goal of districts with equal population it is impossible to shift voters out of one district without simultaneously moving other voters out of another district.

Finally, this Court's recent summary affirmances in *Orwoll v. LaComb* (No. 81-1770, May 17, 1982) and *Schatzle v. Kirkpatrick* (No. 81-1731, May 17, 1982) have, as the Court is well aware, nothing to do with the present case. In neither of those cases had the state legislature adopted any reapportionment plan at all, and the questions presented therefore had to do with the proper role of a District Court required to apportion a State's congressional districts in the absence of any authoritative indication of state policy from the Legislature. Here, by contrast, the New Jersey Legislature has enacted a plan of congressional reapportionment with population deviations less than the statistical imprecision in the 1980 census figures. Unless the Legislature's role in congressional reapportionment is to be reduced to that of a computing machine, with no room whatsoever for considerations of state policy, that plan should be upheld.

Appellants' Motion to Affirm should therefore be denied.

Respectfully submitted,

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